Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

CITY OF REVERE, ET AL.,

Petitioners,

v.

T&D VIDEO, INC., D/B/A MOONLITE READER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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Dated: December 27, 2006

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

I. Whether a manifestly excessive and exorbitant ~~fee petition~~ filed pursuant to 42 U.S.C. Section 1988 can only be denied in its entirety if it "shocks the conscience" of the Court?"

II. Whether a municipal zoning ordinance may, consistent with the First Amendment, effectively prohibit all adult video stores where conventional video stores that have the same adult videos in stock are permitted, resulting in no diminution or suppression of speech?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following entities and individuals are parties to the action:

The members of the Zoning Board of Appeals of the City of Revere, Edward Elfman, Alfred Buccilli, Anthony Giannino, Peter Lattanzi, and John J. Verrengia, were named in their official capacity. Joseph Ferruzzi, Building Inspector of the City of Revere, was also named in his official capacity.

Thaddeus Drabkowski and Del Paone are the shareholders of T&D Video, Inc. d/b/a Moonlite Reader. T&D Video, Inc. is a privately held Massachusetts Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Revere, et al. ("Revere") petition for a writ of certiorari to review the decision of the Appeals Court for the Commonwealth of Massachusetts, entered on June 8, 2006. The Supreme Judicial Court of the Commonwealth declined to review the matter further by denying Revere's application for further appellate review without opinion on September 28, 2006.

OPINION BELOW

The Opinion of the Appeals Court for the Commonwealth of Massachusetts, dated June 8, 2006, Appendix ("App.") C, is reported at 66 Mass.App.Ct. 461, 848 N.E.2d 1221 (2006). The denial of the request for further appellate review was entered without a written opinion and is noted at 447 Mass. 1111, 854 N.E.2d 441 (2006).

JURISDICTION

The Appeals Court issued its decision on June 8, 2006 and Revere timely filed its request for further appellate review with the Supreme Judicial Court on June 28, 2006. The Supreme Judicial Court denied the request for further appellate review on September 28, 2006. This petition is being mailed, by express mail from the United States Postal Service, within ninety days of September 28, 2006 in accordance with Supreme Court Rule 29.2. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(a).[1]

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[1]On December 15, 2006, the Supreme Judicial Court granted an application for further appellate review filed by Respondent T&D Video, Inc. on September 28, 2006. App. F. The grant of

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law. . . abridging the freedom of speech. . . ."

42 U.S.C. Section 1988(b) provides, in pertinent part, that "In any action or proceeding to enforce a provision of [42 U.S.C. Section 1983] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

STATEMENT OF THE CASE

In October of 1993, the Revere City Council considered and passed an amendment to the Revere Zoning Ordinance that became Sections 17.08.065 through 17.08.069 and Section 17.16.045 of the Ordinance (hereafter to be referred to as the "Adult Use Ordinance"). App. 27a-28a. The Adult Use Ordinance provided, inter alia, that adult uses, including an adult video store like the Moonlite Reader, could only be located by special permit in industrial areas of the city, and could not be located within 1000 feet of other adult uses, churches,

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further appellate review was a limited one, however, restricted expressly to the issue raised by T&D Video as to whether its request for fees for the earlier, interlocutory appeal to the Supreme Judicial Court should be allowed in its current fee application. (The Appeals Court had ruled that T&D Video was not entitled to include these fees in its fee application). App. E. The Order for further review is limited, will not affect the final decision of the court in a substantive manner and does not extend the time to file this petition. See *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211, 73 S.Ct. 245, 248, 97 L.Ed. 245 (1952).

playgrounds, schools, residences and certain other uses within Revere. App.28a. The Adult Use Ordinance also contained other restrictions pertaining to lot size, setback requirements and similar land use restrictions. App.28a-29a. The Adult Use Ordinance was enacted to combat the perceived adverse secondary effects of adult uses, such as increased crime, neighborhood deterioration, and the like. App.2a. The purpose of the ordinance was to ensure that, if adult uses were to locate in Revere, that they would be located in non-residential, industrial areas of the city. App.28a.

After construction of its store at 55 American Legion Highway was complete in August of 1994, Respondent T&D Video, Inc. d/b/a Moonlite Reader ("T&D") came forward to reveal its plans to operate an adult video store by applying to the Building Inspector for a sign permit. App. 14a. When told of the use planned for the store, the Building Inspector denied T&D's application for a sign permit, and told T&D that it could not operate an adult use at the premises in conformity with the requirements of the zoning ordinance. App. 14a. T & D then filed an appeal from the decision of the Building Inspector to the Revere Board of Appeals. App. 14a. The Board of Appeal held a hearing on the appeal on October 26, 1994, but before it could release its decision, T&D commenced this action in the Superior Court for the Commonwealth, Suffolk County seeking injunctive relief against Revere, the Zoning Board of Appeals of the City of Revere, Edward Elfman, Alfred Buccilli, Anthony Giannino, Peter Lattanzi, and John J. Verrengia, as members of the Board of Appeals and Joseph Ferruzzi, as Building Inspector of the City of Revere. App. 4a-5a. The Superior Court conducted a hearing on T&D's request for injunctive relief, and, after hearing, released a written opinion granting T&D's request for an injunction against Revere from enforcing its new ordinance against T&D. Appeals

Court Record Appendix ("Rec.") 38-54. In her Memorandum of Decision, the Motion Judge ruled that the Revere Zoning Ordinance appeared to be unduly restrictive and therefore likely violated the First Amendment to the United States Constitution. Rec. 46. Accordingly, she enjoined Revere from enforcing its ordinance during the pendency of this action. Rec. 53-54. Revere promptly filed its notice of appeal from this decision and sought appellate review of the decision of the Superior Court. Rec. 4.

After allowance of Revere's application for direct appellate review, the Supreme Judicial Court heard Revere's appeal from the Order of the Superior Court. See *T&D Video, Inc. v. City of Revere*, 423 Mass. 577 (1996). Concluding that the Trial Judge did not abuse her discretion in granting T&D's request for a preliminary injunction against the enforcement of the zoning ordinance, this Court affirmed the preliminary injunction and dismissed Revere's appeal. App. 13a.

While the appeal was pending, Revere amended its Adult Use Ordinance to make it less restrictive. App. 6a. It reduced the lot size restriction to sixteen thousand to sixty-six thousand square feet. App. 6a. It also redefined an adult video store as having at least twenty percent of its gross sales or inventory consist of adult videos. Trial Exhibits ("Exh.") 251. Under the amended ordinance, conventional video stores could maintain an adult inventory, and so long as it consisted of twenty percent or less of its total inventory, the restrictive provisions of the zoning ordinance would not apply. Exh. 251.

After the conclusion of the appellate proceedings concerning the preliminary injunction, the parties engaged in some pre-trial discovery, consisting of a few depositions and a document production. This discovery phase lasted from approximately October 1,

1996 through November 4, 1999, although there were large periods of inactivity during this time. App. 46a.

On or about May 24, 2001, T&D filed a motion for summary judgment in Superior Court on the merits of its claims. App. 47a. This motion was duly opposed by Revere, using, for the most part, the same materials that it had used in its opposition to the preliminary injunction. App. 47a. After hearing, the Superior Court concluded that the motion must be denied because there were genuine issues of fact left for trial. App. 47a. This phase of the case lasted roughly from November 12, 1999 through January 4, 2002.

The matter was reached for trial on August 6, 2002. Rec. 7. App. 48a. After one day of trial, the case was continued, and after further hearings on August 22, August 23, and August 29, the evidentiary portion of the case concluded. Rec. 7. App. 48a.

As part of the trial evidence, T&D Video offered the testimony of its principal that there were at least four other video stores in Revere that stocked the same adult videos as T&D. Trial Transcript ("Tr.") 43. One conventional video store, Video Craze, had approximately twice the inventory of adult videos as T&D because it was a much larger store, with a very large inventory of videos overall. Tr. 48. The videos offered at the conventional video stores were the same ones as the videos sold by T&D and were purchased from the same distributors. Tr. 43. Based on this testimony, and other evidence, Revere argued at trial that the Adult Use Ordinance did not result in the suppression of speech, and only had an incidental restriction on speech because it restricted only adult video stores like T&D, and not conventional video stores. App. 10a. When the Trial Judge released his decision on October 23, 2002, he rejected this

argument and Revere's other claims in support of the ordinance.

In his ruling, the Trial Judge concluded that the Revere Adult Entertainment Zoning Ordinance precluded the operation of an adult video store at any location in Revere and, therefore, the ordinance violated the First Amendment. App. 9a-10a. Accordingly, he entered a declaration that the ordinance was unconstitutional, and issued an injunction against the enforcement of the ordinance. App. 10a. He also invited T&D to schedule a further hearing before him to assess damages, including reasonable attorneys fees. App. 10a-11a.

Counsel for T&D submitted a request for attorneys fees and costs, in the amount of $1,209,585.33 and the Court conducted an evidentiary hearing on the claim on November 23, 2003. App. 13a.

After hearing, on or about February 9, 2004, the Trial Judge released his decision awarding T&D costs and attorneys fees. App. 12a-25a. As his ultimate conclusion, the Trial Judge awarded T&D attorneys fees in the amount of $868,000, with expert witness fees in the amount of $47,027, for a total award of $915,027. App. 24a-25a. Judgment duly entered on the decisions of the Court on the docket on March 2, 2004 and Revere duly filed its notice of appeal to the Appeals Court from the final judgment.

After full hearing and consideration in the Appeals Court, the Appeals Court released its decision on June 8, 2006. The decision is attached to this application as part of Appendix C and was published at 66 Mass.App.Ct. 461. As its ultimate holding, the Appeals Court concluded that the Adult Entertainment Ordinance violated the First Amendment because the effect of the Ordinance was "to deprive the plaintiff of all locations within Revere

in which it may operate both legally and practicably." App. 40a-41a.

As for the lower court's award of attorneys fees and costs in the amount of $915,027, the Appeals Court vacated this portion of the judgment. Although Revere maintained that the size of the fee requested by T&D was grossly excessive and improperly inflated, the Appeals Court declined to deny the fee request in its entirety. The Court refused to disallow the application because the Court ruled that to do so, the request for fees must "shock the conscience" of the court. App. 43a. The Appeals Court did note, however, that "we are constrained to say that this fee request certainly approaches the outermost parameter that separates an acceptable application from one that 'shocks the conscience.'" App. 43a.

After the release of the decision of the Appeals Court, Revere duly sought further appellate review from the Supreme Judicial Court for the Commonwealth. The Supreme Judicial Court denied Revere's application for further review on September 28, 2006. App. E.

REASONS FOR GRANTING THE WRIT

This petition raises two important issues for resolution. The first issue is whether an exorbitant fee petition must be considered and pared down by the Court rather than disallowed in its entirety. The decision of the Appeals Court, in line with the Fourth Circuit, but contrary to the First, Seventh, and District of Columbia Circuits, requires that a fee petition "shock the conscience" of the court before it could be disallowed. This standard sets the bar too high, and would deprive the courts of a useful remedy when dealing with unduly excessive fee requests.

The second issue is whether a municipal zoning ordinance may effectively bar all adult video stores in the community where there is no net impact on speech because the adult videos are readily available from other sources in the community. The resolution of the Massachusetts courts, denying the community the right to so restrict adult video stores, is contrary to the teachings of *Renton ı Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) and its progeny. If permitted to stand, it will have the effect of requiring communities to create space for adult video stores in their communities. To demonstrate that the holding of the Appeals Court is a distortion of *Renton*, this Court should grant certiorari.

I. THE "SHOCK THE CONSCIENCE" STANDARD CONFLICTS WITH OPINIONS OF MOST OF THE CIRCUIT COURTS

In its decision, the Appeals Court recognized that T&D had filed an "excessive" and "overreaching" fee application with the lower court. Yet it declined to deny all fees to T&D because it concluded that T&D's application did not rise to the level of a petition that would "shock the conscience" of the Court. This standard is too onerous, does not conform with the spirit of prior decisions of this Court, and conflicts with decisions of other federal courts of appeal considering this issue.

This Court's opinion in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.E.2d 40 (1983), established the essential principles with which to evaluate fee applications under 42 U.S.C. Section 1988. Under *Hensley*, a "prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" Id., 461 U.S. at 429. The amount of the fee should be

initially calculated based upon the number of hours reasonably expended multiplied by a reasonable hourly rate. "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." The critical element in any fee application is the exercise of "billing judgment," as "hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Id.* at 434, quoting from *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 401, 641 F.2d 880, 891 (1980)(en banc)(emphasis in original).

Hensley did not specify what the remedy would be if a fee petition were to be submitted that demonstrated a total lack of billing judgment. In this case, although the Appeals Court acknowledged that T&D Video's application was outrageously inflated, it refused to deny the application altogether because it did not "shock the conscience" of the court. This resolution is in conflict with the spirit of *Hensley* and with the holdings of various circuits that have considered the question.

No other circuit, aside from the Fourth Circuit, has held to this stringent standard. For example, in *Brown v. Stackler*, 612 F.2d 1057 (7th Cir. 1980), the Seventh Circuit held that it was appropriate for a District Court to deny all fees to an applicant that had submitted an "intolerably inflated" fee application. Id. at 1057. The Seventh Circuit explained its reasoning as follows:

> Where, as here, the claim is obviously inflated to an intolerable degree, the remedy is plain, and the District Court properly pursued it. If, as appellant argues, the Court were required

> to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place.

Accord, *Lewis v. Kendrick*, 944 F.2d 949, 959 (1st Cir. 1991)("A request for attorneys fees is required to be in good faith and in reasonable compliance with judicial pronouncements, and not an opening gambit in negotiations to reach an ultimate result. The statute gives us discretion, 42 U.S.C. §1988, and the departure here was too extreme to be tolerated"). *Jordan v. United States Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982)(Fee application may be denied in its entirety if manifestly inadequate, "grossly and intolerably exaggerated, or manifestly filed in bad faith"). *Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258-1260 (D.C.Cir. 1993)("Outrageously unreasonable" fee request may be denied in its entirety).

Even where the decisions of the circuit courts have permitted a fee recovery, the courts have generally articulated the legal standard in the same manner as in *Brown, Lewis, Jordan, and Environmental Defense Fund, supra.* For example, in *Case v. Unified School District No. 233*, 157 F.3d 1243 (10th Cir. 1998), the Tenth Circuit Court of Appeals noted that a court had the authority to deny an "outrageously excessive" fee request in its entirety. Accord, *Loranger v. Stierheim*, 10 F.3d 776, 782 n.8 (11th Cir. 1994)(Other circuits have denied "a request for attorney's fees in its entirety when" the request is "outrageously unreasonable"). In each instance, the court, while noting the punitive effect of such a ruling, expressed

approval for the rule in order to deter the filing of outrageous fee requests. In those particular cases, the fees requested, while excessive, did not rise to the level required to warrant denial of all fees.

Only the Fourth Circuit has adhered to the "shock the conscience" standard as a basis for denying all fees. In *Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92, 96-97 (4th Cir. 1993), the Court expressly held that the "shock the conscience" standard was the basis for a decision to deny all fees. As the *Landow* court stated, "[W]e hold that a district court may, in its discretion, deny a request for attorneys' fees in its entirety when the request, submitted pursuant to 42 U.S.C. §1988 is so outrageously excessive it 'shocks the conscience of the court.'"

Although the decision to deny all fees is undoubtedly limited to special circumstances, to restrict the exercise of discretion to situations in which the conscience of the court is "shocked" unduly limits an appropriate sanction.[2] In cases such as this one, courts must exercise the power to deny grossly inflated fee petitions. Particularly where the ultimate fee award is rendered against a public authority (and the taxpaying public), courts must take particular care to ensure that counsel for prevailing parties do not overreach. The most effective deterrent to prevent

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[2] The "shock the conscience standard is the one used to determine violations of substantive due process. See e.g. *Rochin v. California*, 342 U.S. 165, 72 S.Ct.205, 96 L.Ed.183 (1952); *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct.408, 1 L.Ed.2d 448 (1957); *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003). This standard is an extremely high one, appropriate for application to substantive due process claims, but ill-fitting when applied to attorneys fee petitions. As in this case, a fee application may be exorbitant and grossly excessive but simply does not "shock the conscience" of the court.

unreasonable requests is the ability to deny all fees. This Court should therefore grant certiorari to resolve the conflict among the circuits and ensure that the ability to deny all fees, although perhaps used sparingly, is in fact available to defeat an exorbitant fee application.

II. THE DECISION OF THE APPEALS COURT FAILS TO FOLLOW THE TEACHINGS OF THIS COURT

T&D was only a prevailing party, and therefore entitled to file an application for attorneys fees, by virtue of the decision of the Court holding that the Revere Adult Use Ordinance was unconstitutional as an unlawful suppression of speech. This conclusion fails to follow the applicable First Amendment jurisprudence of this Court.

The undisputed evidence in the record shows that the adult videos like the ones sold by T&D were readily available at conventional video store outlets. Tr. 43. The record evidence also shows that the videos were readily available from other sources, including the internet. Exh. 112-114. This availability demonstrates that there are reasonable alternative avenues of communication sufficient to satisfy the prevailing rule of law contained in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

The evidence in the record, all of which was adduced by T&D, was that there were at least four other outlets in Revere that stocked the same adult videos as T&D. Tr. 43. One such store, Video Craze, had approximately twice the inventory of adult videos as T&D. Tr. 48. These videos were essentially the same as the ones sold by T&D, and were purchased from the same distributors. The difference was that these other outlets featured adult videos as a small

portion of their overall inventory, as opposed to T&D, which only sold adult videos. Tr. 42-52.

Since the adult videos were available through conventional video stores, the ordinance has the effect of eliminating unwanted secondary effects of adult video stores, without diminishing the availability of speech.

For First Amendment purposes, it is immaterial if the video is available for purchase from a conventional video store, as opposed to an "adult" video store. So long as the speech is available, the First Amendment interests are satisfied. Viewed in this light, the Revere Ordinance is simply a form of business regulation, similar in effect to the one in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). In *Young*, the City sought to separate adult theaters rather than have them concentrated. In this case, the ordinance sought to have adult videos sold, if at all, in the context of a conventional video store, as opposed to an all adult video store. This solution is a rational one directed at the very problem illustrated in this case by T&D's business neighbor. After T&D moved in, the adjoining business, a customs broker, breached its lease for the space next to T&D and moved rather than have to do business next to T&D. Tr. 615-619. The all adult video store brings with it these type of secondary effects, such as driving away other businesses that do not want to locate near such a use. The conventional video store suffers no such difficulties. There is no suppression of speech, as the videos are readily available elsewhere in the city. There is also no net effect on speech, as the volume of videos available does not suffer by confining them to conventional video stores. There is no First Amendment guarantee that adult video stores must be permitted to exist, where the videos are readily available from other sources.

This principle was demonstrated by the Court of Appeals for the First Circuit in *Globe Newspaper Co. v. Beacon Hill Architectural Commission*, 100 F.3d 175 (1st Cir. 1996). In *Globe*, the Commission issued regulations that barred the newspaper company from selling papers from street coin operated news racks. While noting that the news racks were an efficient and cost-effective method of distributing the papers, the Court held that the regulation was constitutionally valid. Even though the regulation banned the street news rack form of distribution in its entirety, there were ample other methods available to the paper to have its product distributed.

This rule has direct application to this case, notwithstanding the decision of the Appeals Court. This is not a case, as suggested by the Appeals Court in footnote 8, App. 39a, that Revere is infringing on "the constitutional right of the plaintiff to speak in a particular way on the theory that others are delivering similar speech in a manner more to the government's liking." It is the essence of every time, place and manner restriction that government restricts speech. See e.g. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). With its ordinance, Revere was enacting a time, place and manner restriction to further its substantial governmental interests in limiting the severe adverse secondary effects of adult entertainments. *Renton* gives Revere the right to do so, even if the ultimate effect is some restriction on speech. Although the ordinance would curtail T&D's operation, the same adult videos are readily available for sale, consistent with the provisions of the zoning ordinance, at numerous locations throughout Revere. Accordingly, there is no net adverse effect on speech. In these circumstances, the requirement that there be reasonable alternative avenues of communication is satisfied, and the ordinance should be upheld under *Renton* principles.

If permitted to stand, the decision of the Appeals Court will mandate that every community make land available for an adult video use. This Court's cases require no such result. To establish the principle that municipalities do not have to make special allowances for adult video stores, where the videos are otherwise readily available in the community, this Court should grant certiorari to review the decision of the Appeals Court.

CONCLUSION

For each of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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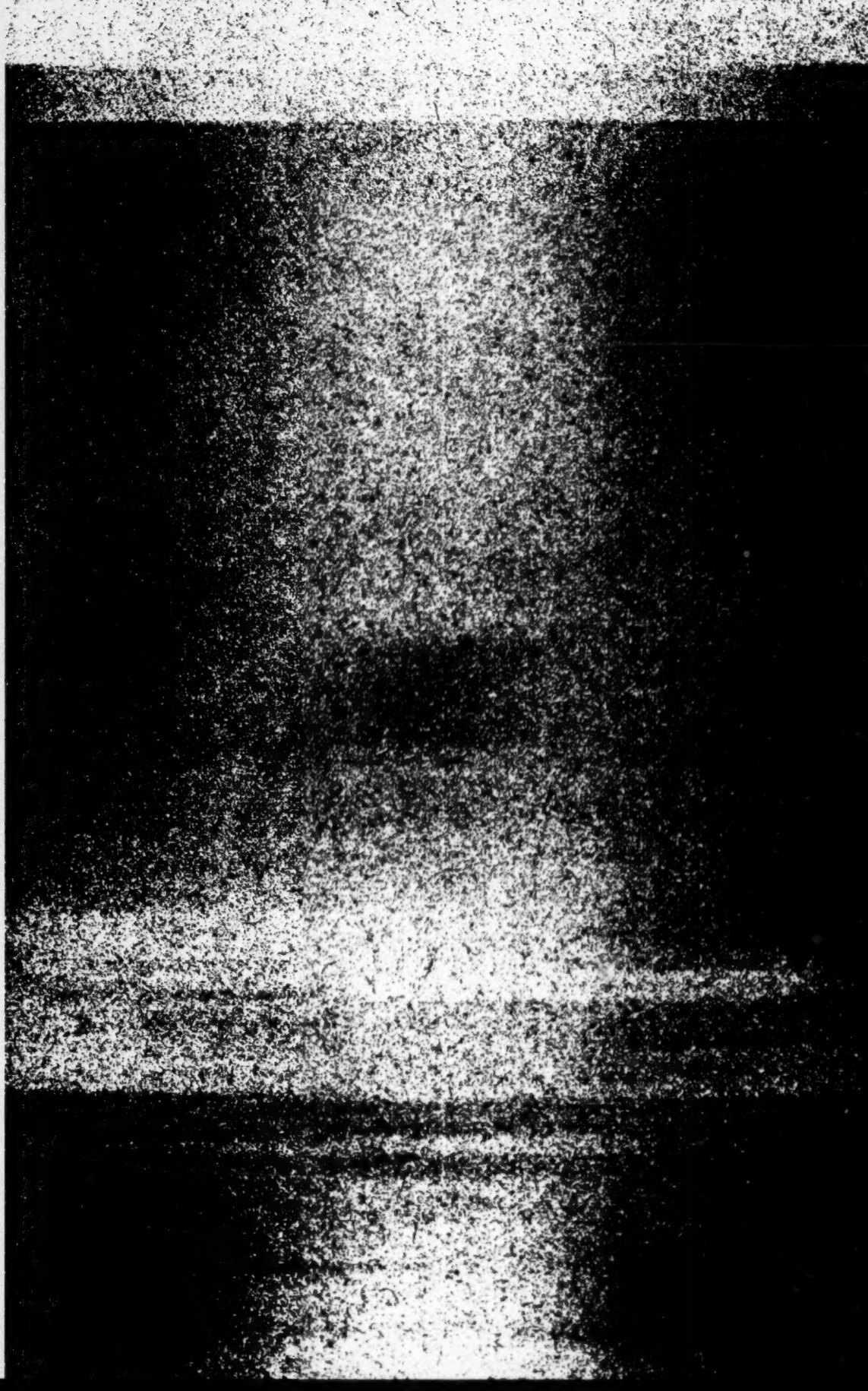

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO. 94-6216A

T & D VIDEO, INC.
d/b/a MOONLITE READER

v.

THE CITY OF REVERE, MASSACHUSETTS,
THE ZONING BOARD OF APPEALS OF
THE CITY OF REVERE, MASSACHUSETTS,
EDWARD ELFMAN, as Chairman of the
Zoning Board of Appeals of Revere,
ALFRED BUCCILLI, as Member of the
Zoning Board of Appeals of Revere,
ANTHONY GIANNINO, as Member of the
Zoning Board of Appeals of Revere,
PETER LATTANZI, as Member of the
Zoning Board of Appeals of Revere,
JOHN J. VERRENGIA, as Member of the
Zoning Board of Appeals of Revere, and
JOSEPH FERRUZZI, as Building Inspector
of Revere

FINDINGS OF FACT, RULINGS OF LAW, AND JUDGEMENT

FINDINGS OF RELEVANT FACTS

1. In September, 1993, T&D Video, Inc., d/b/a Moonlite Reader ("T&D") signed a lease and began preparations to open an adult video store at 55 American Legion Highway, Revere.

2. On September 14, 1993, Thaddeus Drabkowski and Mr. Del Paone, the principals and sole shareholders of T&D, went to the Office of the City Clerk of Defendant City of Revere to complete a business certificate for T&D.

3. The person then working the permitting desk in the City Clerk's Office informed Messrs. Drabkowski and Paone that, before any certificate could issue, they needed to go to the City Solicitor's office to complete a form pertaining to the operation of video stores in Revere.

4. Particularly, Mr. Dabrowski was thereupon told by representatives of Revere that the business certificate would not be granted unless he signed an "agreement" stating that no adult videos or related materials would be sold at the store.

5. Mr. Drabkowski refused to sign the proffered "agreement", but Mr. Dabrowski was ultimately issued a Business Certificate.

6. On September 16, 1993, the Mayor of Revere, Robert J. Haas, Jr., sent to the Revere City Council a proposed "Adult Entertainment" amendment to the Revere Zoning Ordinance which ultimately was enacted as Sections 17.08.065 through 17.08.069 and Section 17.16.045 of the Ordinance.

7. The Adult Entertainment Ordinance was drafted by the City Planner, Mr. Frank Stringi, in response to community concerns about adult entertainment uses gravitating to Revere with the demise of the adult entertainment district -- "the Combat Zone"-- in Boston.

8. In drafting the 1993 Revere adult use zoning ordinance, Mr. Stringi considered Revere's prior experience with adult uses, and the adverse impact upon the City and its residential neighborhoods. The 1993 Ordinance imposed regulations on various types of adult entertainment, including "Adult Entertainment Establishments, adult bookstore[s], adult videostore[s], adult motion picture theater[s], and advertisement signs or devices."

9. In purporting to regulate the various types of adult entertainment, including "Adult Entertainment Establishments, adult bookstore[s], adult videostore[s], adult motion picture theater[s], and advertisement signs or devices," the 1993 ordinance provided operation of these establishments would be allowed by special permit in the General Industrial District only, and only if all of the following minimum criteria were met:

> "A. [The establishments] may not be located less than 1000 (one thousand) feet from the nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private kindergartens; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; churches; residential uses; and residential districts.
>
> B. A 30-foot landscaped strip shall be provided along the property line fronting a public or private way.

C. [The establishments] are to be limited to lots greater than 25,000 and not more than 40,000 square feet.

D. [The establishments] may not be allowed in a multi-use building or building containing other retail or consumer uses.

E. [The establishments] shall not be located within 100 ft. of a public or private way and must be set back a minimum of 100 ft. from all property lines.

F. No adult use advertising sign shall contain any moving, flashing or animated lights, or visible moving or movable parts."

10. Through the geometric interplay of the lot size restrictions and set-back restrictions under the 1993 Ordinance, no adult use whatsoever could lawfully be located anywhere in Revere. [Assuming the maximum lot size of 40,000 square feet in a 200 feet by 200 feet configuration, the required set back of 100 feet from all property lines would leave no area on which to locate a structure housing the business.]

11. After renovation of the premises at 55 American Legion Highway was largely complete, in August of 1994, T&D came forward to reveal its plans to operate an adult video, book, and paraphernalia retail store:

12. On September 1, 1994, when told of the use planned for the store, Mr. Joseph Ferruzzi, the

Building Inspector, denied T&D's application for a sign permit, and told T&D it could not operate an adult use at the premises in conformity with the requirements of the zoning ordinance. Among other "violations", T&D's location was within 1000 feet of the Revere High School and residential areas, as well as being outside of the industrial district.

13. After Mr. Ferruzzi, the Building Inspector, denied its application, T & D filed an appeal from the decision to the Revere Board of Appeals in accordance with statutory procedure.

14. The Board of Appeal held hearings on the appeal on October 26 and November 30, 1994, and filed its decision with the City Clerk on December 6, 1994.

15. In its decision, the Board of Appeal noted, inter alia, that T&D could not operate a store in compliance with the zoning ordinance in that it was located in the wrong zone, within 1000 feet of the High School and surrounding residential areas, and in a "multi-use" district.

16. During the course of the proceedings before the Board of Appeal, T & D commenced this action in Superior Court to exempt itself from the application of the Adult Use Ordinance.

17. On January 30, 1995, Councillor Stephen Colarossi circulated a draft ordinance which had the effect of substantially revising the provisions of the 1993 Ordinance.

18 On March 6, 1995 the Revere City Council deleted the 100-foot set-back provision.

19. On May 1, 1995, The City Council repealed the original, (1993), Adult Entertainment Ordinance and substituted in its place Mr Colarossi's draft ordinance.

20. The 1995 Ordinance, currently in effect, limits all adult uses to the General Industrial District (now called the Technology Enterprise District), and requires the granting of a special permit for an adult use. The 1995 Ordinance lowered the set-back requirement to the 50 and 35 feet standards in the so-called "GI District," and revised the lot size restriction to 16,000-66,000 square feet. As did the 1993 Ordinance, the 1995 Ordinance requires all adult uses to be 1,000 feet or more from each other, as well as all churches, schools, parks, playgrounds, conservation areas, residential uses, and residential districts.

21. All but one of the potential sites for adult use in the GI District either do not meet the lot size requirements of the 1995 Ordinance, are otherwise eliminated by the 1,000 foot dispersion requirements and the set-back requirements of the district, or by environmental regulation. The only location that conceptually meets all requirements, 41 Lee Burbank Highway is the subject of past and present petroleum contamination, and is part of a larger parcel owned by Gibbs Oil Company, presently not-subdivided, and which contains large petroleum tanks. The Court finds this location patently unsuitable for the operation of a retail, non-petroleum product-related business.

22.

23. The court specifically credits the testimonies of Mr. Jonathan Witten and Mr. R. Bruce Mclaughlin, both qualified as experts in zoning matters and urban planning, to the penultimate effect that the 1995 Ordinance effectively excluded T&D Video from operation within the C District.

24. Specifically, the court credits the testimony of Mr. Witten, accepted as an expert in zoning matters, who stated the adult use restriction to the general industrial zone and the prohibitions provided in the sub-parts of the ordinances foreclosed the possibility of locating an adult use anywhere in the city, with the exception of 41 Lee Burbank Highway, which Mr. Witten found to be in all likelihood oil-contaminated.

25. Specifically, as dispositive of the issue, the court credits Mr. Whitten's affirmative response to the court's question; "So what you're saying is that under the [old and new] zoning laws there is nothing in the northerly or southerly districts that is suitable with the potential exception theoretically of41 Lee Burbank Highway, which you find to be deficient for other reasons?"

26. The court further credits the uncontroverted testimony of Mr. R. Bruce Mclaughlin to the effect that, never in his review of hundreds of city and town zoning laws had he encountered such minimum and maximum lot size requirements as those contained in the Revere ordinance.

RULINGS OF LAW

1. "Regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). In the present case, a Revere city employee told Drabkowski that, before the city would issue a business certificate, he would have to fill out a form stating that no adult videos or related materials would be sold at his store. Such a form is a prior restraint on speech and violates the First Amendment. Id.

2. Revere's revision of the 1993 zoning ordinance has not rendered the controversy concerning the enforcement of that ordinance against T&D video moot. See City of Richmond v. J.A. Croson, 488 U.S. 469, 478 N.1 (1989) (holding expiration of ordinance does not render controversy moot where ordinance's legality that city enforced against appellee was in question). Revere's reliance on DHL associates Inc. v. O'Gorman, 199 F.3d 50 (1st circuit 1999) to bolster its mootness argument is misplaced. In DHL, the plaintiff could never allege damages from the expired ordinances because the City never enforced the ordinances against the plaintiff. Id. at 54. In the instant case, Revere did attempt enforcement of the 1993 Ordinance when, on September 1, 1994, the city refused T&D's sign permit application and notified T&D that the 1993 Ordinance forbade the proposed adult use of its store. Therefore, because a live controversy then existed between the parties over whether Revere's refusal to grant a permit pursuant to the ordinance was unlawful and thus entitled T&D to injunctive relief and

damages, the action is not moot. See City of Richmond v. J.A. Croson, supra at 478.

3. T&D Video has a constitutionally protected right to engage in the sale of non-obscene "adult" video tapes. T&D Video. Inc. v. City of Revere, 423 Mass. 577, 580 (1996). Counsel for both sides forcefully and ably presented at trial detailed and focused evidence on the issue of the City's "intent" in enacting the Ordinances in question - i.e. whether this court should view the Ordinances as patent prior restraint on speech or merely content-neutral time, place and manner regulation of adult entertainment.
. . . enactment of the 1993 Ordinance, on September 16, 1993, two days after T&D sought a business certificate, evidences Revere's intention to single out T&D. See 754 Orange Ave., Inc v. City of West Haven, 761 F.2d 105,113 (2nd Cir. 1985).

. . . although concededly "content-neutral" [see, e.g., City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728 (2002) alternative avenues of communication of adult-based content unavailable, and not as a reasonable so-called "time, place, and manner restriction." See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76 (1981). See also City of Los Angeles v. Alemeda Books Inc., supra, at 1737.

4. Because the Revere Ordinances left no such reasonable alternative avenues of communication available, the court does not address the issue, ably contested by both counsel, of whether the secondary effects upon the community of T&D Video's adult video (and associated use) store was primary in the motivation of the City of Revere in passing the Ordinances in question. See Renton v. Playtime

Theatres, Inc., supra at 50 (holding that content-neutral adult theater zoning ordinance must allow for reasonable alternative avenues of communication).

5. Additionally, the site of 41 Lee Burbank Highway is not a reasonable alternative for T&D Video's operations. See Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1532 (9th Cir. 1993) (finding area of oil refinery and area occupied by gas storage tanks properly excluded under Renton as reasonable alternative site); see also Basiardanes v. City of Galvaston, 682 F.2d 1203, 1214 (5th Cir. 1982) (ordinance an effective ban where theaters restricted to most unattractive, inaccessible and inconvenient areas of city).

6. Lastly, evidence that the public may be able to obtain adult videos in conventional video stores does not abrogate T&D Video's rights to compete in the so-called "adult video" business in Revere. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it maybe exercised in some other place." Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76-77 (1981); quoting Schneider v. State, 308 U.S. 147, 163 (1939).

JUDGMENT

It is therefore **ORDERED** that Judgment enter for the Plaintiff in this action, and that Defendants be and they hereby are permanently enjoined from enforcement of the existing Sections 17.08.065 through 17.08.069 (or as the same may have been amended) of the 1995 Zoning Ordinance of the City of Revere against the Plaintiff. A hearing on an Assessment of Damages, including attorneys' fees and

costs in the necessary prosecution of this action, may be scheduled by the Plaintiff before the undersigned.

/s/ Ernest B. Murphy, J.
Ernest B. Murphy, J.
Associate Justice

DATED: October 23, 2002

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
C.A. No. 94-6216A

T & D VIDEO, INC.
d/b/a MOONLITE READER,

vs.

THE CITY OF REVERE, MASSACHUSETTS & OTHERS[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND COSTS

On September 14, 1993, plaintiff T&D Video ("T&D") applied to defendant City of Revere to build out and operate an adult video store in Revere. Consequently, the City of Revere implemented zoning ordinances restricting adult entertainment to a certain district and requiring conformity with set-back, space and location provisions. Citing the zoning ordinance as a violation of T&D's First Amendment rights, pursuant to 42 U.S.C. § 1983 and G. L c. 12, §11H, T&D filed for injunctive relief against the City of Revere seeking to enjoin it from enforcing the

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[1] The Zoning Board of Appeals of the City of Revere, Massachusetts, Edward Elfman, as Chairman of the Zoning Board of Appeals of Revere; Alfred Buccilli, Anthony Giannino, Peter Lattanzi, John J. Verrengia, as members of the Zoning Board of Appeals of Revere; and Joseph Ferruzzi, as Building Inspector of Revere.

ordinance.[2] On Oct. 23, 2002, the court entered judgment for T&D, thereby permanently enjoining the City of Revere from enforcing the adult use zoning ordinance because it constituted an unconstitutional prior restraint on speech.

T&D now files this petition seeking an award, as provided by 42 U.S.C. § 1988 and G. L. c. 12, § 11I, for attorneys' fees and costs associated with the prosecution of its complaint against the City of Revere. T&D contends that the City of Revere owes it $1,209,585.33 in attorneys' fees and costs.[3] The City of Revere opposes the petition, arguing that the amount T&D seeks is either so egregiously disproportionate to the reasonable fees and costs required for the prosecution of the matter that the court should deny the petition in its entirety, or, alternatively, that the Court reduce the amount sought substantially, suggesting an award of $50,000.00 to be appropriate.

BACKGROUND

In September 1993, T&D signed a lease and prepared to open an adult video store at 55 American Legion Highway, Revere, Massachusetts. T&D's principals sought a business certificate from the Office of the City Clerk of Revere ("Clerk"). A Clerk employee informed T&D's principals that they would first need to go to the City Solicitors Office to complete a video store business form. Upon T&D's return, the Clerk's office requested that T&D's principals sign an agreement stating that they would not sell adult

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[2] T & D Video, Inc. v. City of Revere & others, 423 Mass. 577 (1996) (affirming that the Superior Court judge did not abuse her discretion when she issued a preliminary injunction).

[3] Attorneys fees total $1,093,626.00; out of pocket expenses total $67,037.77; and expert fees total $48,921.56.

videos or other adult related material. T&D refused to sign the agreement but the Clerk nonetheless issued the business certificate. On September 16, 1993, the Mayor of Revere, Robert J. Haas, Jr., proposed an Adult Entertainment amendment to the Revere Zoning Ordinance. The 1993 Ordinance imposed regulations on various types of adult entertainment.[4]

Once T&D completed renovation, T&D revealed its intention to operate an adult video. book and paraphernalia retail store. Upon review, the Building Inspector denied T&D's application for a sign permit and informed T&D that its proposed business use failed to conform with the new zoning ordinance requirements. After denial of its application, T&D filed an appeal to the Revere Board of Appeals. On October 26 and November 30, 1994 the Board held hearings and subsequently found that T&D's adult video store failed to comply with zoning ordinance requirements.[5]

On January 30, 1995, Revere City Councilor Stephen Colarossi circulated a draft ordinance, which revised the 1993 Ordinance by eliminating certain restrictions. The City Council repealed the 1993 Ordinance and adopted the revised 1995 Ordinance. The 1995 Ordinance lowered the set-back requirements and revised the lot size restrictions. Other restrictions, however, remained in force.

Expert testimony indicated that the 1995 Ordinance essentially restricted adult entertainment venues to a single location, which was unsuitable for a

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[4] The regulations required that adult entertainment establishments could operate only by special permit in the General Industrial District and only if it satisfied certain size and location conditions.

[5] During the proceedings, T&D commenced an action in Superior Court to exempt itself from the application of the Adult Use Ordinance.

variety of reasons. T&D filed for injunctive relief claiming that the zoning ordinance violated 42 U.S.C. § 1983 and G. L. c. 12, § 11H because it did not leave any alternative outlet for its speech. The court (Murphy, J.) permanently enjoined the City of Revere from enforcing its provisions, finding that the zoning ordinance was unconstitutional. In accordance with 42 U.S.C. § 1988 and G. L. c. 12, 11I, T&D filed this petition seeking attorneys' fees and costs associated with the prosecution of its complaint against the City of Revere.

DISCUSSION

Section 1988 of 42 U.S.C., authorizes judges in their discretion to award reasonable attorneys' fees to a prevailing party to any action to enforce a provision of § 1983.[6] 42 U.S.C. § 1988; Perini Corp. v. Comm'r of Revenue, 419 Mass, 763, 772, cert denied, 516 U.S. 822 (1995). This statutory provision endeavors to promote civil rights enforcement and to deter violations of civil rights by encouraging private lawsuits against civil rights abuses. Lincoln St. Realty Co. v. Green, 374 Mass. 630 (1978). The statute entitles the petitioner to an award for attorneys' fees when the court finds that the petitioner is the prevailing party and the court exercises its discretionary authority to award fees in the

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[6] In cases brought under 42 U.S.C. § 1983, though the fee award language of § 1988 states "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" awards in favor of prevailing civil rights plaintiffs are essentially obligatory. Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 293 (1st Cir. 2001). Federal and state civil rights statutes both include parallel provisions for an award of attorneys fees and costs. 42 U.S.C. § 1988; G. L. c. 12, § 11I. Unlike the discretionary language of 42 U.S.C. § 1988, the language in the Massachusetts Civil Rights Act, G. L. c. 12, § 11I, mandates that the prevailing party receive an award for reasonable attorneys' fees and costs. Davignon v. Clemmey, 176 F. Supp. 2d 77, 94 (D. Mass. 2001).

petitioner's favor. Draper v. Town Clerk of Greenfield, 384 Mass. 444 (1981), cert. denied, sub. nom. Draper v. Prescott, 456 U.S. 947 (1982). For the purposes of 1988, the court deems the party a "prevailing party" when it "succeeds on any significant issue in litigation which achieves some of the benefit the [party] sought in bringing suit." Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978).

The party applying for attorneys' fees must first establish its status as the prevailing party." Draper, 384 Mass. at 452. The court considers the applicant the "prevailing party" if it "succeeds on any significant issue in litigation which achieves some of the benefit the [party] sought in bringing suit." Id. at 453. Here, T&D satisfies its status as the prevailing party because this court permanently enjoined the City of Revere from enforcing its Adult Zoning Ordinance, which effectively enabled T&D to open its adult video store.

Denying the Petition Due To Its Outrageous and Unreasonable Claim

Once the plaintiff establishes its status as the prevailing party, as T&D does here, the court's discretion to deny attorneys' fees and costs is "extremely narrow." Espino v. Besteiro, 708 F.2d 1002, 1005 (5th Cir. 1983). The court should award attorneys' fees and costs, pursuant to § 1988, as a matter of course unless special circumstances exist that would render the award unjust. Johnson v. Comm'r of Pub. Welfare, 419 Mass. 185, 191 (1994) (stating that a judge's discretion to deny fees is limited and the prevailing party should ordinarily recover attorneys' fees unless special circumstances render such award unjust).

The City of Revere argues that the court should use its discretion to deny T&D's petition in its entirety because it reflects a total lack of billing judgment and is grossly excessive. In applying 42 U.S.C. § 1988 for an award of attorneys' fees and costs, the court has the discretion to deny an entire fee request if the fee request is "so exorbitant as to shock the conscience of the court. . . ." Sun Publ'g Co., Inc. v. Mecklenburg News, Inc., 823 F.2d 818, 819 (4th Cir. 1987). This extreme remedy seeks to curtail a prevailing party's unethical practice of knowingly submitting an outrageously excessive fee petition as a negotiating strategem "in the hope that the court would award at least some, preferably high, percentage of the requested fee." Fair Hous. Council of Greater Wash. v. Landow, 999 F.2d 92, 98 (4th Cir. 1993).

Federal courts have denied attorneys' fee awards when the court deemed the prevailing party's petition as excessive or egregious. See, e.g., Scham v. Dist. Courts Trying Criminal Cases, 148 F.3d 554 (5th Cir. 1998); Fair Hous. Council of Greater Wash., 999 F.2d at 92; Lewis v. Kendrick, 944 F.2d 949, 958 (1st Cir. 1991); Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980). In these cases, the court was able to articulate special circumstances, which rendered the award unjust. The facts in the present case, however, do not warrant the court using its discretionary authority to deny attorneys' fees because the application of the petitioners falls far short of a "special circumstance" contemplated by the "striking" cases.

The court distinguishes the case at bar from the proffered cases by highlighting important differences. In Scham, the court found that the prevailing party's counsels status as a solo practitioner with one year experience neither justified his $350 per hour billing rate, nor explain his enhanced $750 per hour rate. Scham, 148 F.3d at

557. In contrast, T&D's lead counsel Attorney Glenn Alberich's billing rate, ranging over the course of ten years from $250 to $400 per hour, is not an inordinate rate for a large Boston law firm employing attorneys who have twenty-five years of legal experience. Similarly, in Fair Hous. Council of Greater Wash., the court found that the prevailing party's counsel failed to exclude fees attributable to unsuccessful claims and that counsel's submitted time records were "woefully inadequate." 999 F.2d at 97. Conversely, T&D's counsel received a favorable disposition on its only claim. Additionally, T&D's computer-generated time records, if anything, were overly replete with the minutes description of services rendered.

Considering that T&D hired experienced First Amendment counsel from large Boston law firm and who participated in nearly ten years of prolonged administrative proceedings and litigation, the court finds that the content of the petition for attorneys fees and costs neither rises to the level of a "special circumstance" requiring total disallowance, nor does it shock the conscience of the court." Sun Publ'g Co., Inc., 823 F.2d at 819.

The City of Revere alternatively argues that if the court opts not to use its discretion to deny T&D's petition, this court should at least reduce the award. The court now analyzes the reasonableness of T&D's petition to determine if it is a fair and just award.

Reducing the Amount Sought in the Petition

The City of Revere ("Revere") first argues that this court should reduce the award because T&D's attorneys failed adequately to justify their billable rates. To support its assertion Revere cites Attorney Glenn Alberich's alleged failure to explain his

justification for increasing his hourly billing rate from $250 per hour to $400 per hour. Similarly, Revere contends that T&D failed to explain or justify hourly billing rates for other attorneys who worked on this case.

The fee applicant bears the burden of documenting the applicable hourly rate. Guckenberger v. Boston Univ., 8 F. Supp. 2d 91, 107 (D. Mass. 1998) (citing Missouri v. Jenkins, 491 U.S. 274, 286-287 (1989). Counsel requesting attorneys' fees must establish that their billable rates are in conformity with community market rates. Student Pub. Interest Researce Group v. AT&T Bell Lab., 842 F.2d 1436, 1450 (3d Cir. 1988). An attorney may establish the community market rate by simply submitting affidavits from a number of attorneys who live in the community and possess comparable qualifications and skill." Id.

In the present case, T&D's counsel submitted affidavits from Attorneys Anthony M. Doniger and Kenneth H. Tatarian establishing the community rate standard for civil rights and constitutional rights attorneys. Attorney Doniger stated that the prevailing rate in complex civil litigation cases for attorneys who have Attorney Alberich's legal experience ranged from $375 to $500 per hour, while Attorney Tatarian stated that the prevailing rate, in 1994, ranged from $200 to $400 per hour. Countering, Revere cites case law indicating that $200 per hour is a reasonable rate. Martino v. Mass. Bay Transp. Auth., 230 F. Supp. 2d 195, 205 (D. Mass. 2002).

Revere also argues that the billing record indicates that billable hours were both excessive and duplicative. Specifically, Revere contends that T&D attorneys billed for research hours in the preliminary injunction phase, summary judgment phase and trial phase which went far beyond what was necessary and

appropriate for proper preparation of this case. Similarly, Revere contends that various counsel for T&D billed for the same services without explaining the necessity for its duplicity. Mindful of the need to revisit prior work after the long periods of dormancy of any complicated piece of civil litigation, and after an extensive review of the voluminous time records submitted by petitioners, the court nonetheless finds merit in Revere's assertions that T&D unnecessarily billed for duplicative services. In making this finding, the court does not cast aspersion on the ethics of petitioners' counsel, merely that there is a considerable element of unnecessary duplication in these time records, and that a substantial portion of such duplicative billing must be laid to the inefficiency of petitioners' counsel.

The court extensively reviewed the billing records to determine when and where T&D's counsel "double-billed" its services. Though the court's document review identified many duplicative records, it is virtually impossible to reconcile every single disparity because ten years of litigation produced a voluminous record consisting of thousands of separate entries. The resources available to this court do not permit an examination and reconciliation, with absolute precision of every single disparate entry. It suffices to say that the court did its best.

The court's methodology employed the so-called "lodestar" basis of fee calculation[7], however, and weighed a number of judicially-indicated appropriate factors to determine a fair and just award for T&D's counsel's time and expense in litigating this action. In

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[7] The lodestar approach contemplates judicial ascertainment of the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" as the starting point in constructing fee awards. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

this regard, it is worthy of mention that the undersigned Associate Justice had substantial experience in the trial of civil matters as a partner in a major Boston law firm, practiced trial law in the City of Boston for some thirty years before his appointment to the bench, and thus has significant practical experience in the complexities of so-called "big firm" billing practices.

Lodestar Calculation

The amount of a fee award rests largely within the discretion of the trial judge. Fontaine v. EbtechCorp., 415 Mass. 309, 324 (1993) (finding that the amount of a reasonable attorneys fee, awarded on the basis of statutory authority, "is largely discretionary with the judge"); Linthicum v. Archambault, 379 Mass. 381, 398 (1979). The award amount should, however, be "reasonable" and represent the fair market value of counsel's time reasonably spent on the case. Torres v. Attorney Gen., 391 Mass. 1, 16 (1984). Courts sometimes refer to this measure of the fee award as the "lodestar calculation." See, e.g., Connolly v. Harrelson, 33 F. Supp. 2d 92, 95-96 (D. Mass. 1999) (discussing the "lode-star" calculation process). The court also has discretion to adjust the lodestar up or down, but must justify such only under compelling circumstances. Fontaine, 415 Mass. at 324; Draper, 384 Mass. at 456-457. Courts consider a combination of factors when determining the reasonable fair market value of services.[8] See,

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[8] Among the other factors, the court considers 1) the time and labor required, the novelty and difficulty involved and the skill required to properly perform legal services; 2) the fee customarily charged in the locality for similar legal services; 3) the amount involved and results obtained; 4) time limitations; and 5) the experience, skill and reputation of the attorney. See, e.g., Scham, 148 F.3d at 559 (citing Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)).

e.g., Linthicum v. 379 Mass. at 390; Heller v. Silverbranch Constr. Corp., 376 Mass. 621 (1978).

Calculating reasonable attorneys fees in this fashion requires the court to identify the number of hours billed in the contemporaneous billing records for each attorney and paraprofessional entering time spent working on the case and then to apply a reasonable discount for any time deemed excessive or duplicative. Once the court determines the reasonable number of hours expended, the court simply multiplies those hours by a reasonable hourly rate to achieve the lodestar figure. Determining the reasonable hourly rate requires the court to find the prevailing hourly rate in Boston for persons with comparable skill, experience and reputation as the persons who worked on the case. Blum v. Stenson, 465 U.S. 886, 895 (1984). The court's goal is to fashion an award equal to what the services were objectively worth in the so-called "legal marketplace", as opposed to what other amount the prevailing party's counsel may have billed. Heller, 376 Mass. at 629.

In applying the lodestar calculation, the court also considers the effect of Revere's obstructionist conduct, which the court finds substantially contributed to T&D's alleged accumulation of $1,209,585.33 in attorneys' fees and costs. The court finds that Revere unduly prolonged this litigation by causing delays at various stages during litigation. It was patently obvious to the court that Revere was never interested in resolving this case through settlement or alternative dispute resolution, and that this attitude, politically engendered, obtained long after it was apparent that its actions in framing and attempting to enforce unconstitutional zoning regulations enacted for the sole purpose of "zoning out" T&D Videos proposed use of its premises as an

adult entertainment video and bookstore, were patently illegal.

Additionally, the nature of Revere's constitutional violations contributed to T&D's counsel's difficult and prolonged involvement in the matter. Issues involving First Amendment civil rights are often complex and difficult to resolve against entrenched governmental opposition without the expenditure of prodigious amounts of legal services. Often, as a practical matter, the resources and expertise required to battle for constitutionally-based civil rights reside solely in the capacities, however inefficient, of large law firms, whose cost structures necessarily require premium billing rates.

Expert Fees

Revere argues that 42 U.S.C. § 1988 and G. L. c. 12, § 11I do not allow the prevailing party an award for expert fees. In relevant part, 42 U.S.C. § 1988 permits an award for expert witness fees in excess of statutory limits in "any action or proceeding to enforce a provision of § 1981 or § 1981a . . . ." As T&D brings this action pursuant to 42 U.S.C. § 1983, the statutory provision allowing expert fees is not applicable to T&D's federal claim.

As to T&D's "state" claim, the provisions of the so-called Massachusetts Civil Rights Act do not explicitly permit an award of expert fees.[9] When a Massachusetts statute grants explicit cost-shifting authority, however, it raises a presumption that this court may award expert witness fees upon a

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[9] In relevant part, G. L. c. 12, § 11I states, "[any person whose exercise ... of rights ... has been interfered with ... as described in section 11H may institute and prosecute in his own name ... [and the prevailing party] ... shall be entitled to award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court."

successful Massachusetts Civil Rights Act action. Krewson v. City of Quincy, 74 F.3d 15, 19 (1st Cir. 1996) (citing Linthicum, 379 Mass. at 389). The court adopts this presumption.

Revere argues, pursuant to G. L. c. 12, § 11H, that T&D's state claim is not applicable because a violation of the Massachusetts Civil Rights Act occurs only when the plaintiff presents evidence of "threats, intimidation, or coercion." G. L. c. 12, § 11H. Attempting to enforce the zoning ordinance, Revere asserts, does not constitute a "threat, intimidation or coercion."

Case law establishes, however, that G. L. c. 12, § 11H does not require actual or threatened force; economic coercion is sufficient, Buster v. George W. Moore, Inc., et al., 438 Mass. 635, 648 (2003) (holding that a public university's denial of student organizations use of its facilities constituted a threat, intimidation or coercion). Here, Revere participated in pure economic coercion when it denied T&D the opportunity to operate a lawful business and forced it to enter a "scorched earth" campaign of legal vindication. Accordingly, G. L. c. 12. 11I entitles T&D to an award for expert fees, which this court incorporates in its final lodestar figure listed below.

In consideration of the time expended to resolve this matter, and after careful and exhaustive review of all the billing records and parties' arguments, the court finds that a lodestar calculation of 3100 hours at the average hourly rate $280, equaling a lodestar figure of $868,000 represents reasonable attorneys' fees and costs for litigating this matter. The court has calculated the reasonable "expert fees" incurred in this matter to be in the sum of $47,027. Thus, the total award to petitioners' counsel in the matter is $915,027.

ORDER

For the reasons stated herein, it is hereby ORDERED that defendant City of Revere forthwith pay plaintiff T&D's attorneys' fees and costs in the amount of $915,027 as reasonably and necessarily incurred in the successful prosecution of this matter.

February 9, 2004

/s/ Ernest B. Murphy
Ernest B. Murphy
Associate Justice of the Superior Court

Dated February 9, 2004

APPENDIX C

T & D VIDEO, INC.[1] *vs.* CITY OF REVERE & others.[2]

No. 05-P-109.

Suffolk. December 14, 2005. – June 8, 2006.

Present: LAURENCE, KANTROWITZ, & COWIN, JJ.

Constitutional Law, Zoning, Freedom of speech and press. *Zoning*, Validity of by-law or ordinance. *Evidence*, Relevancy and materiality. *Civil Rights*, Attorney's fees. *Practice, Civil*, Attorney's fees, Costs. *Witness*, Expert, Fee.

CIVIL ACTION commenced in the Superior Court Department on November 16, 1994.

The case was heard by *Ernest B. Murphy*, J., and a motion for attorney's fees and costs was also heard by him.

Ira H. Zaleznik, for the defendants.

Allen C.B. Horsley, for the plaintiff.

COWIN, J. The defendants appeal from a judgment of the Superior Court declaring that defendant city of Revere's adult entertainment zoning ordinances effect unconstitutional restrictions of expression under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, and enjoining enforcement of

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[1] Doing business as Moonlite Reader.

[2] Zoning board of appeals of Revere and the building inspector of Revere.

those ordinances against the plaintiff, T & D Video, Inc. The defendants appeal also from the Superior Court order awarding attorney's fees and costs to the plaintiff.

1. *Background.* We set forth certain underlying facts based on unchallenged findings by the trial judge, supplemented where appropriate by undisputed evidence in the record. We reserve for later discussion in connection with certain issues those facts that the parties do dispute. On September 2, 1993, Thaddeus Drabkowski, a shareholder of the plaintiff corporation, signed a lease on behalf of the corporation as tenant to occupy property at 55 American Legion Highway in Revere. Drabkowski and his fellow shareholder, Del Paone, intended to open at that location an adult video store to be called "Moonlite Reader IV." Drabkowski and Paone began renovating the premises to prepare the space for use as a video store, and visited the Revere city clerk in order to complete a business certificate.

When they requested the appropriate paperwork at the city clerk's office, Drabkowski and Paone were informed that in order to obtain a business certificate for a video store, they first would have to complete additional paperwork from the city solicitor's office. The additional paperwork was an "agreement" stating that no adult videos or related materials would be sold at the store. Drabkowski and Paone refused to sign the agreement, but notwithstanding their refusal, a business certificate dated September 14, 1993, was issued by the city clerk.

On September 16, 1993, the mayor of Revere submitted to ***463** the city council a proposed "adult entertainment" amendment to the Revere zoning ordinance. This amendment was adopted by the city council on November 8, 1993, as §§ 17.08.065

through 17.08.069, and § 17.16.045, of the Revere zoning ordinance.[3] Section 17.16.045 provided:

> "Adult entertainment establishments, adult bookstore[s], adult videostore[s], adult motion picture theatre[s] and advertising signs or devices erected, constructed, placed, altered, converted or otherwise changed may be allowed by special permit in the I [general industrial] District in conformance with the following minimum criteria:
>
> "A. Adult Entertainment Establishments, adult bookstore[s], adult videostore [s], adult motion picture theatre[s] and advertising signs or devices may not be located less than 1000 (one thousand) feet from the nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private kindergartens; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; churches; residential uses; and residential districts.
>
> "B. A 30 ft. wide landscaped strip shall be provided along the property line fronting a public or private way.
>
> "C. Adult Entertainment Establishments, Adult Bookstores, Adult Videostores, Adult Motion Picture Theatres and advertising signs or devices are to be limited to lots greater than 25,000 square feet but not more than 40,000 square feet.
>
> "D. Adult Entertainment Establishments, Adult Bookstores, Adult Videostores, Adult

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[3] Sections 17.08.065 through 17.08.069, and § 17.16.045, will hereinafter be referred to as the "adult entertainment ordinances" or the "ordinances." Where necessary, distinctions may be made between the ordinances as adopted in 1993 and as amended in 1995 by referring to them as the "1993 ordinances" and the "1995 ordinances" respectively.

> Motion Picture Theatres and advertising signs or devices may not be allowed within a multi-use building or building containing other retail or consumer uses.
>
> ***464** "E. All advertising signs and adult entertainment uses, adult bookstores, adult videostores, and adult motion picture theatres shall not be located within 100 ft. of a public or private way and must be set back a minimum of 100 ft. from all property lines.
>
> "F. No adult use advertising sign shall contain any moving, flashing or animated lights, or visible moving or movable parts."[4]

These provisions effectively prohibited any adult establishments from operating in Revere because the combination of lot size restrictions and setback requirements rendered it virtually impossible for a structure to be built that did not violate the ordinances. See *T & D Video, Inc. v. Revere*, 423 Mass. 577, 582 (1996).

After renovations on the plaintiff's store had been completed, the store's landlord obtained a retail occupancy permit for the premises. On August 31, 1994, the plaintiff sought a sign permit for the store. The defendant building inspector of Revere denied the plaintiff's application for a sign permit because the store did not comply with the requirements of the adult entertainment ordinances. The denial for the sign permit also notified the plaintiff that its intended use was not permitted at its location. After this denial, the plaintiff appealed to the defendant zoning board of appeals of Revere, which affirmed the decision of the building inspector.

While that appeal was pending, the plaintiff instituted this action against the defendants pursuant to 42 U.S.C. § 1983; G.L. c. 12, §§ 11H, 11I; and G.L.

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[4] Sections 17.08.065 through 17.08.069 define terms used in § 17.16.045.

c. 40A. In this proceeding, the plaintiff seeks a judgment declaring that the adult entertainment ordinances violate its rights under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution, by infringing impermissibly on its freedom of expression, together with an injunction prohibiting the enforcement of the ordinances with respect to the plaintiff's proposed adult video store. A judge of the Superior Court entered a preliminary injunction barring ***465** enforcement of the ordinances against the plaintiff's operation; the order granting the preliminary injunction subsequently was affirmed by the Supreme Judicial Court. See *T & D Video, Inc. v. Revere, supra* at 583.

Shortly after commencement of this action, but prior to entry of the preliminary injunction, the city administration submitted to the city council proposed amendments to the adult entertainment ordinances. The proposed amendments were adopted on May 1, 1995 (following entry of the preliminary injunction). The 1995 ordinances lowered the setback requirement for adult establishments from one hundred feet to thirty or fifty feet, depending on the type of establishment,[5] and revised the lot size requirements for adult video stores from 25,000 to 40,000 square feet to 16,000 to 66,000 square feet.[6] Otherwise, the adult entertainment ordinances largely remained unchanged from the 1993 version. More specifically,

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[5] Under the 1995 ordinances, "adult entertainment establishments" and adult motion picture theaters are required to be set back fifty feet from any public or private way and all property lines; adult bookstores and adult video stores are required to be set back thirty feet from any public or private way and all property lines.

[6] Under the 1995 ordinances, "adult entertainment establishments" and adult motion picture theaters are required to be situated on lots from 22,000 to 66,000 square feet.

under the 1995 ordinances, adult uses remained limited to the I district (later renamed the technology enterprise district); still were required to be 1,000 feet or more from each other as well as from schools, churches, parks, playgrounds, conservation areas, residential uses, and residential districts; and still required a special permit in order to operate.

A jury-waived trial was conducted with respect to the 1995 adult entertainment ordinances. A different judge determined that the plaintiff had a constitutionally protected right to sell adult videotapes that were not obscene, and concluded that the ordinances infringed on this right. Crediting the plaintiff's expert witnesses, the judge found that the combination of the 1995 ordinances and applicable environmental regulations left only one site in Revere where the adult entertainment activity contemplated by the plaintiff would be permitted to take place. This site was 41 Lee Burbank Highway, which the judge found ***466** to be patently unsuitable for the operation of a retail business because it was part of a larger parcel, owned by Gibbs Oil Company, that was not subdivided and that was contaminated by petroleum. The judge found in addition that both the 1993 and 1995 ordinances specifically were directed against the plaintiff. Finding that the ordinances effectively banned the plaintiff's protected speech completely, leaving no reasonable alternative avenue of communication for the adult-based content at issue, the judge ruled that the ordinances were unconstitutional both as an impermissible prior restraint on speech and as an impermissible time, place, and manner regulation. He accordingly permanently enjoined the defendants from enforcing the adult entertainment ordinances against the plaintiff. Relying on 42 U.S.C. § 1988 and G.L. c. 12, § 11I, he ordered further that the defendants pay attorney's fees and costs in the amount of $915,027.

The defendants appeal on the merits and on the fee award. At the outset, they attack the decision of

the trial judge to exclude from evidence eleven allegedly obscene adult videos drawn from the plaintiff's inventory, challenging his determination that obscenity was not an issue in the case. Next, the defendants assert that various findings made by the judge are not supported by the evidence, and that the legal conclusions regarding the constitutional validity of the ordinances that he based on such findings are erroneous. Finally, the defendants assert that the plaintiff's request for attorney's fees was so excessive that it should have been disregarded altogether or, in the alternative, that the award should be reduced. We affirm the judgment, which declared the ordinances unconstitutional as applied to the plaintiff and permanently enjoined their enforcement. We agree with the defendants that the award of attorney's fees and costs is excessive and thus vacate the order on the plaintiff's petition.

2. *Exclusion of videotapes.* The defendants offered in evidence a selection of eleven videotapes purchased at the plaintiff's store, arguing that the tapes were evidence that the plaintiff's speech was constitutionally obscene and therefore not entitled to protection under the First Amendment or art. 16. See *Miller v. California*, 413 U.S. 15, 25 (1973); *Commonwealth v. Trainor*, 374 Mass. 796, 798-799 (1978). The judge excluded ***467** the tapes as irrelevant. The defendants claim that this was error, contending that the obscenity of the material determined the level of protection to which the plaintiff was entitled under the First Amendment and art. 16, and thus the level of scrutiny that should have been applied to the ordinances.

The question whether evidence is relevant is addressed to the sound discretion of the trial judge, and his decision will be reversed only for palpable error. See *McLaughlin v. Vinios*, 39 Mass.App.Ct. 5, 8 (1995). Because the regulatory effort at issue here applies to speech that is not obscene as well as to speech that is, we agree with the judge that the status

of the individual items that are regulated is irrelevant. There was therefore no error.

While obscenity, as defined for constitutional purposes, is beyond the pale of First Amendment protection, adult entertainment that is not obscene is entitled to protection under both the First Amendment and art. 16. See *Schad v. Mt. Ephraim*, 452 U.S. 61, 65, (1981); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991); *Commonwealth v. Sees*, 374 Mass. 532, 537 (1978); *Cabaret Enterprises, Inc. v. Alcoholic Bevs. Control Commn.*, 393 Mass. 13, 16-17 (1984); *T & D Video, Inc. v. Revere*, 423 Mass. at 580. Adult entertainment entitled to such protection includes the showing of adult motion pictures that are not obscene, nude dancing that is not obscene, and the sale of adult videotapes that are not obscene. See *Schad v. Mt. Ephraim, supra; Barnes v. Glen Theatre, Inc., supra; Commonwealth v. Sees, supra; Cabaret Enterprises, Inc. v. Alcoholic Bevs. Control Commn., supra; T & D Video, Inc. v. Revere, supra.* Because the regulation of speech that is not obscene affects fundamental rights protected by the First Amendment and art. 16, the constitutionality of such regulation is assessed under a standard of either strict or intermediate scrutiny. See *Commonwealth v. 707 Main Corp.*, 371 Mass. 374, 380, 357 N.E.2d 753 (1976); *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 197 (2005). In contrast, by virtue of its unprotected status, the regulation of obscenity requires no scrutiny of the statute or ordinance under which such regulation takes place. That obscenity may be proscribed by the government is a given. Judicial inquiry is directed not at the government's constitutional power ***468** to regulate, which is established, but rather at the question (often a difficult one) whether the material that the government seeks to regulate is in fact obscene in the constitutional sense.

Here, there seems to be little doubt that the plaintiff's inventory includes material that is not

obscene. Were it to include obscene material as well, such a fact would, as the judge concluded, be irrelevant to an examination of the ordinances. Where the provisions of a regulation could affect both protected and unprotected speech, the regulation is evaluated under the standard applied to protected speech. See *Miller v. California*, 413 U.S. at 23-24; *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-875 (1997). This elevated standard is applied regardless of whether the challenged speech is actually protected; the pertinent question is whether the regulation *potentially* could infringe on constitutionally protected speech, not whether it actually does so. See *Schad v. Mt. Ephraim*, 452 U.S. at 66; *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. at 199-201 & n. 14.

In this case, the ordinances in question applied to all adult entertainment, including that portion of the plaintiff's offerings that is plainly not obscene. Because the ordinances affected speech that is not obscene, and therefore is constitutionally protected, the trial judge properly applied heightened scrutiny. If indeed there is obscenity within the plaintiff's inventory, the defendants may, if they deem it necessary, seek criminal or civil relief. See G.L. c. 272, §§ 28-31. They cannot, however, insulate these ordinances from judicial review, and the judge correctly excluded the allegedly obscene videotapes as irrelevant.

3. *Constitutionality.* "[R]egulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). As had the judge who presided at the preliminary injunction hearing, the trial judge assumed that the ordinances were "content neutral" in that they were not adopted for the purpose of restraining speech on the basis of its content. See *T & D Video, Inc. v. Revere*, 423 Mass. at 581. While it is not altogether clear to us on this record that the

defendants' response was not motivated by distaste for the ***469** plaintiff's activities, we are content to proceed on the same assumption. If so, the defendants permissibly could adopt so-called "time, place, and manner regulations ··· so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton v. Playtime Theatres, Inc., supra* at 47. The government thus may take steps to regulate reasonably anticipated secondary effects of the plaintiff's activities, such as increased traffic, reduced property values, or impact on the character of a neighborhood. See *id.* at 47-50. However, a valid exercise of such authority presupposes that these reasons genuinely formed the basis for the government's action, see *T & D Video, Inc. v. Revere, supra* at 581, and that such exercise does not limit unreasonably alternative avenues of communication, see *Renton v. Playtime Theatres, Inc., supra* at 50, 53-54.

In the present case, the judge did not pause at the question whether the defendants had established the presence of a legitimate governmental interest in regulating secondary effects, commenting only that the parties contested "whether the secondary effects upon the community of [the plaintiff's] adult video (and associated use) store was primary in the motivation of the [c]ity of Revere in passing the [o]rdinances in question." Instead, he moved directly to consideration of whether the ordinances effectively removed all possibility that the plaintiff could operate within the municipality. In concluding that they did, he found that application of the ordinances, in conjunction with existing environmental regulation, precluded the plaintiff's activities in all but a single location, with that location otherwise being "patently unsuitable for the operation of a retail, non-petroleum product-related business." Thus, the ordinances could not be justified as a permissible time, place, and manner restriction. In addition, the judge determined

"that the totality of the evidence demonstrates conclusively that Revere directed the ordinance specifically at [the plaintiff]." He accordingly ruled that because the ordinances effectively banned protected speech, they operated as an impermissible prior restraint.

The essence of the defendants' argument on appeal is that the judge's findings in these respects are not supported by the evidence, and that the unwarranted findings in turn led to erroneous***470** application of constitutional principles. The defendants challenge particularly the findings that the plaintiff was the target of the ordinances and that the ordinances as applied left no area of the city in which the plaintiff legally could locate, thus unreasonably limiting alternative avenues of communication. If, the defendants' argument continues, these findings were wrong, then the ordinances qualified as reasonable time, place, and manner restrictions and did not effect an impermissible prior restraint.

The defendants attack the judge's finding that the adult entertainment ordinances were directed against the plaintiff. The finding seems well supported in the record, given evidence that the ordinances, in their proposed form, were submitted by the mayor to the city council two days after Drabkowski and Paone applied for a business certificate. There was in addition evidence provided by the building inspector that two councillors, after they learned of the plaintiff's proposed operation, stated that the ordinances would be adopted. However, even were the finding permissible, we are not persuaded that it is meaningful. If the plaintiff were the only entity seeking to operate an adult video store in Revere, ordinances regulating such operations could be said to target the plaintiff, but such a characterization would not render otherwise valid restrictions unlawful. Indeed, the motivation for a legislative enactment is generally irrelevant in assessing its constitutionality. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47-48, quoting

from *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"). While a political animus against an individual or his speech may have a bearing on whether resulting regulation is in fact content neutral, that is not an issue in this case, and unspoken legislative motivations do not appear to us to be relevant in assessing whether an ultimate legislative product is a permissible time, place, and manner restriction.

Deciding that the ordinances effectively banned the plaintiff's communications in Revere altogether, the judge determined that the ordinances effected an impermissible prior restraint on protected speech. Such a characterization follows inevitably ***471** from a recognition that the plaintiff lawfully could not carry on its communicative activities at all and was thus subject to the most complete prior restraint of which a government is capable. The defendants challenge the finding that the ordinances precluded alternative avenues of communication as not supported by the evidence.

In this regard, the defendants argue that we should conduct an independent review of the judge's finding that the ordinances left no alternative sites on which an adult video store legally could operate because it is a "mixed finding of law and fact" which implicates constitutional rights. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498-511 (1984). The plaintiff contends that independent review is not required because it is necessary only when the decision below limits a plaintiff's constitutional protection and not when the lower court confirms constitutional rights. See *Planned Parenthood Assn./ Chicago Area v. Chicago Transit Authy.*, 767 F.2d 1225, 1228-1229 (7th Cir.1985); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir.1988); *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*,

991 F.2d 154, 160 (4th Cir.1993).[7] The Supreme Judicial Court has not addressed the issue, and we are not disposed to make the attempt to resolve it. We conclude that, even applying the more rigorous standard of ***472** independent review, the judge was justified in finding that the ordinances precluded adult video stores from operating anywhere in Revere.

Independent review requires that we examine the record to determine "whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995). Here, we ask whether the ordinances left any reasonable alternative sites available where adult expression of the type engaged in by the plaintiff could be carried on in Revere. We conclude that they did not. It was reasonable for the judge to credit the testimony of the plaintiff's land use experts: certified land use planner R. Bruce McLaughlin, and Jonathan

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[7] It is clear that the independent review standard applies where the lower court's decision upheld a limit on expressive activity. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567-568 (1995); *Planned Parenthood League of Mass., Inc. v. Bell*, 424 Mass. 573, 579-580, cert. denied, 522 U.S. 819 (1997). The Federal circuit courts of appeals currently disagree, however, on whether independent review should be applied to decisions affirming constitutional expressive rights. Compare *Planned Parenthood Assn./ Chicago Area v. Chicago Transit Authy.*, 767 F.2d at 1228-1229 (Seventh Circuit holds that clear error standard and not independent review applies to lower court's decision restricting government's ability to exclude advertisements based on message); *Daily Herald Co. v. Munro*, 838 F.2d at 383 (Ninth Circuit applies clear error standard to determination that government unconstitutionally has restricted free speech); *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d at 160 (Fourth Circuit applies clear error standard, not independent review, to decision declaring restriction on speech unconstitutional), with *Jones v. Heyman*, 888 F.2d 1328, 1330-1331 (11th Cir.1989) (applying independent review to District Court judgment that restriction on speech was unconstitutional); *Brown v. Palmer*, 915 F.2d 1435, 1441 (10th Cir.1990) (applying independent review where lower court declared restriction on speech unconstitutional).

Witten, also a certified land use planner as well as an environmental engineer, an attorney, and a law professor. Both experts agreed that the adult entertainment ordinances, when combined with existing environmental restrictions, left only one land area in Revere available for adult entertainment, with that location likely contaminated with petroleum. In addition, the location is a portion of an otherwise undifferentiated, larger parcel that has not been subdivided. Furthermore, Frank Stringi, Revere's city planner, conceded at trial that there was no single lot in Revere, other than the aforementioned contaminated land area, on which an adult video store could open under the zoning ordinances without having to obtain either a variance or permission to subdivide from the Revere zoning board. There being no place in Revere that reasonably was available for the use contemplated by the plaintiff, it is clear that the ordinances operated so as to leave the plaintiff no alternative avenues of communication.[8]

In addition, regulations that require permits or licenses before ***473** there can be lawful expression are prior restraints. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Prior restraints are presumptively invalid and are subject to facial challenges, but may be upheld if they meet constitutional requirements. See *FW/PBS, Inc. v. Dallas, supra; Forsyth County v. Nationalist Movement,*

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[8] It is not an answer that adult videos are found in the inventories of video stores in Revere that feature material other than adult material. The government may not infringe on the constitutional right of the plaintiff to speak in a particular way on the theory that others are delivering similar speech in a manner more to the government's liking. There is a "general rule ··· that the speaker has the right to tailor the speech···· Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., supra* at 573-574.

supra. Under the First Amendment, licensing requirements for adult entertainment are invalid prior restraints if they vest in a government official overly broad discretion to grant the license, if they fail to place a limit on the time within which the decision maker must decide whether a license shall issue, or if they are not subject to ordinary judicial review. See *FW/PBS, Inc. v. Dallas, supra* at 225-226; *Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 779, 781-82 (2004) (overruling *FW/PBS, Inc. v. Dallas, supra*, in part, by holding that ordinary judicial review procedures are adequate and expedited judicial review is not required for adult entertainment permitting requirements).

Even had we concluded that the Revere adult entertainment ordinances qualified as permissible time, place, and manner restrictions, the ordinances still may effect an unlawful prior restraint because they are susceptible to a construction that would permit a ban of even authorized adult uses unless a special permit is granted, while vesting unlimited discretion in the city council to grant or deny such a permit. Subsections (C) and (D) of § 17.16.045 of the 1995 ordinances list conditions that must be met before an adult use permit can be granted. Once those conditions are met, however, pursuant to § 17.48.080 of the Revere zoning ordinance, the city council still has discretion to grant or deny the permit by a two-thirds vote of its members. It is not at all clear that the city council must grant a permit request where the applicant has complied with the ordinances; rather, the city council appears to be free to withhold a special permit for an adult use for any reason. If so, the ordinances invite "illegitimate abuse of censorial power," and would impose impermissible prior restraints even if they were otherwise valid. See *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988).

***474** In summary, we have assumed without deciding that the Revere adult entertainment ordinances are content neutral, and that they

represent an effort by the municipality to combat anticipated secondary effects. We are satisfied on this record that the effect of such regulation, however, is to deprive the plaintiff of all locations within Revere in which it may operate both legally and practicably. As such, the ordinances fail a requirement of permissible time, place, and manner regulation, and effect an unlawful prior restraint upon protected expression. We accordingly conclude that the Superior Court judge properly permanently enjoined their enforcement against the plaintiff.

4. *Attorney's fees and expenses.* Pursuant to 42 U.S.C. § 1988 and G.L. c. 12, § 11I, the plaintiff applied for an award of attorney's fees and expenses totaling $1,209,585.33 ($1,093,626 in attorney's fees, $67,037.77 in expenses, and $48,921.56 in expert witness fees). That portion of the application that relates to attorney's fees seeks an award based on 4,082.8 hours of the time of various attorneys expended on the case from its inception through the Superior Court trial on the merits, including the preliminary injunction proceeding, the defendants' appeal to the Supreme Judicial Court of the preliminary injunction order, discovery, the summary judgment proceeding, and the eventual trial.[9] These events took place over a span of approximately eight years, although there obviously were periods of inactivity throughout.

The trial judge reduced the number of compensable hours to 3,100, finding "that there is a considerable element of unnecessary duplication in these time records, and that a substantial portion of such duplicative billing must be laid to the inefficiency of [the plaintiff's] counsel." He concluded that a reasonable rate was $280 per hour, which he derived by applying a weighted average of the rates charged by

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[9] The plaintiff seeks additional attorney's fees and costs in connection with the present appeal. See *Fabre v. Walton*, 441 Mass. 9, 10 (2004).

the plaintiff's lead counsel (which rates ranged from $250 per hour at the inception of the case to $400 per hour by the end of the Superior Court phase). The judge accordingly awarded attorney's fees of $868,000 (3,100 hours multiplied by $280 per hour), a figure that apparently absorbs out-of-pocket expenses other than expert ***475** witness fees. He allowed an additional $47,027 for expert witness fees,[10] resulting in an overall award of $915,027.

The defendants appeal from the fee award on multiple grounds. They argue first that the fee petition should have been denied outright because it was unconscionably excessive. In the alternative, they contend that the plaintiff failed to satisfy its burden of establishing a reasonable hourly rate for the various attorneys who worked on the case, and that the hours billed to the matter were unreasonable even after the judge eliminated close to 1,000 of them. The defendants argue further that expert witness fees should not have been awarded because they are not authorized under 42 U.S.C. § 1988 in 42 U.S.C. § 1983 cases, and that such fees could not be awarded under G.L. c. 12, § 11I, because the defendants' actions did not constitute "threats, intimidation or coercion" as required for application of that statute. G.L. c. 12, § 11H, inserted by St.1979, c. 801, § 1. The plaintiff counters that the fees and costs awarded by the trial judge were within his discretion, particularly given the adamant refusal of the defendants to compromise their position, even in the face of an adverse Supreme Judicial Court decision, and the resulting prolongation of the proceedings.

Section 1988 of 42 U.S.C. provides that the prevailing party in a civil rights action brought under 42 U.S.C. § 1983 may recover reasonable attorney's fees, subject to the discretion of the trial judge. That the plaintiff is the prevailing party here is not

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[10] His decision does not disclose why the amount sought ($48,921.56) was reduced.

disputed. While the language of § 1988 is permissive, case law has established that awards of fees to prevailing civil rights plaintiffs are "virtually obligatory," *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 293 (1st Cir.2001), absent "special circumstances," *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). A judge may deny in its entirety a request for an award of fees only if the amount that the prevailing party requests is so "unreasonable" and exorbitant that it "shocks the conscience," or if counsel makes no good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. See *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir.1980); ***476** *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir.1991); *Fair Hous. Council v. Landow*, 999 F.2d 92, 96 (4th Cir.1993); *Scham v. District Cts. Trying Criminal Cases*, 148 F.3d 554, 558 (5th Cir.1998).

We reject the defendants' contention that an award of attorney's fees should be denied altogether. In so concluding, we nevertheless are constrained to say that this fee request certainly approaches the outermost parameter that separates an acceptable application from one that "shocks the conscience." Nevertheless, having in mind the objectives of fee-shifting statutes in general and § 1988 in particular, which include the legislative interest in inspiring legal actions directed to the identification and elimination of civil rights abuses, we believe that it would be inconsistent with those legislative concerns to refuse to allow any attorney's fees at all on this record.

We turn, therefore, to an evaluation of the specifics of the application. In our view, the number of hours for which compensation is sought (4,082.8) is excessive by any rational standard, and the reduction by the trial judge to 3,100 hours is inadequate to correct the overreaching. We question as well the employment of an imbedded rate of $280 per hour as a reasonable rate without reference to the skills or

experience of the attorneys who contributed 1,810.8 of the hours in question.[11]

Where the trial judge allows a fee petition to a prevailing party, the amount allowed must be reasonable. To determine what amount is reasonable, the court generally engages in a "lodestar" analysis, see *Hensley v. Eckerhart*, 461 U.S. at 433-437; *Gay Officers Action League v. Puerto Rico*, 247 F.3d at 295, the essence of which is the multiplication of the "number of hours reasonably expended on the litigation" by "a reasonable hourly rate." *Hensley v. Eckerhart, supra* at 433. In making this calculation, the court should consider the time counsel spent on the case exclusive of hours that are excessive, redundant, duplicative, or unproductive. See *id.* at 434; *Gay Officers Action League v. Puerto Rico, supra*. The rate applied to the reasonable hours expended should be the prevailing rate in the community, taking into account the experience and qualifications***477** of the attorneys involved. See *Gay Officers Action League v. Puerto Rico, supra*. The fee applicant bears the burden of documenting in detail the hours expended and of establishing the market rate. See *Blum v. Stenson*, 465 U.S. 886, 898 (1984); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir.1984). After making its initial calculation, the court then may adjust the fee upward or downward based on other considerations, including the results obtained. See *Hensley v. Eckerhart, supra* at 434-435. Massachusetts cases governing attorney's fees awards reflect similar considerations. See *Linthicum v. Archambault*, 379 Mass. 381, 388-389 (1979); *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 325-326 (1993).

With these criteria in mind, we consider the nature of the case and the legal services reasonably

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[11] The figure of 1,810.8 hours is derived by subtracting the hours attributed to lead counsel (2,272) from the total hours for which compensation is sought (4,082.8).

required. Lead counsel for the plaintiff, H. Glenn Alberich, is a well-known, experienced practitioner with respect to the First Amendment and its application to government action that may have an impact on protected expression. His hourly rates presumably reflect the demand for his services and the amount clients are willing to pay for his representation. Furthermore, it is reasonable to assume that both he and his law firm market themselves as a place to go on First Amendment questions because of Mr. Alberich's expertise and reputation.

The counterpart to such skills, and the increased compensation that they command, is that a client (and by extension, an opposing party subject to a fee award) should receive the benefit of the attorney's expertise in the form of at least some reduction in the amount of time that an attorney of lesser experience with the subject matter would have to expend. This is particularly so in this case. Insofar as the governing law is concerned, nothing decided in the Supreme Judicial Court, in this court, or in the Superior Court is new. Principles governing adult entertainment zoning and its First Amendment implications effectively were established well before this case was commenced. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47-48. While the subject certainly is not simple, and application of the relevant law can be complicated, attorneys who hold themselves out as experts in the field presumably already have overcome the difficulties that would require considerable study and preparation by less experienced counsel.

***478** It is for these reasons that we are mystified by the number of hours for which compensation is sought. While the trial judge made a real effort to remove various redundancies, we think that that kind of fine probing of individual entries in the time records may, as it often does with large fee applications, have missed the forest for the trees. We

believe that, at least in this case, the application is evaluated more effectively by examining the various component parts.

The plaintiff seeks approximately $100,000 for the preliminary injunction phase of the case in Superior Court, an amount that, while perhaps not intolerable, is high for the effort reasonably required. Furthermore, we are not inclined to award any fees for the appeal to the Supreme Judicial Court of the preliminary injunction order. That court awards attorney's fees where appropriate in its own cases, and has procedures for doing so. See *Fabre v. Walton*, 441 Mass. 9, 10-11 (2004). There is no mention of a fee award in the Supreme Judicial Court's decision, see *T & D Video, Inc. v. Revere*, 423 Mass. at 583, and any request for fees in connection with that appeal should have been submitted there. Thus, the amount sought for the appeal of the preliminary injunction order (an additional $100,000) should have been rejected.[12]

Following the entry of the preliminary injunction and the affirmance thereof, there was an extended period of discovery. For discovery conducted between October, 1996, and November, 1999, the plaintiff seeks reimbursement for approximately 365 hours, generating bills of more than $100,000. By October, 1996, the hearing on the preliminary injunction prayer had been conducted in the Superior Court and that court's order had been affirmed by the Supreme Judicial Court. That means that there already had been considerable development of the factual positions and the supporting evidence of the parties, particularly on the plaintiff's part, to establish the likelihood of success on the merits, a critical element in a request for preliminary injunctive relief. The plaintiff has not satisfied its burden of demonstrating that the extent of discovery for which it

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[12] We make no comment on the merits regarding a charge of almost $100,000 to defend an appeal of an order granting a preliminary injunction.

was responsible during *479 the subsequent three-year period was justified by the reasonable requirements of litigating this case.

Subsequently, between November, 1999, and January, 2002, the plaintiff's attorneys billed over $300,000 for which they seek reimbursement in connection with the prosecution of a motion for summary judgment. While the plaintiff may have been encouraged to seek summary judgment by virtue of its success in obtaining a preliminary injunction and in the appeal therefrom, it is also a fact that the defendants already had amended the adult entertainment ordinances in an effort to meet some of the deficiencies on which the earlier version had failed. Cases of this nature are often fact-specific because the ways in which a given zoning ordinance affects the rights of given property owners or users will vary with circumstances and frequently will be the subject of good faith disputes. Summary judgment for the plaintiff, while perhaps not impossible, see *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991), was a longshot, and eventually was denied. We are not prepared to award fees exceeding $300,000 for a summary judgment motion that involved legal principles well known by the plaintiff's attorneys, as well as facts that already had been tried in large part in the preliminary injunction proceeding, where that motion had a questionable likelihood of success from the beginning.

Over and above the amount sought for the preliminary injunction phase of the case, together with the amounts sought for defense of the defendants' appeal of the injunction order, discovery, and the summary judgment proceeding, the plaintiff seeks more than $500,000 for the preparation for, and the conduct of, a jury-waived trial that consumed less than four full trial days and that traversed much of the ground already covered during the preliminary injunction hearing. We have not been shown anything that comes close to an explanation why professional

services reasonably required in connection with the trial called for an expenditure of one-half of $1 million.

The plaintiff defends the fee application in part on the basis of the judge's finding that the defendants' conduct was "obstructionist," and that the defendants unduly prolonged the litigation. If that is so, such tactics will result in an increase in *480 the number of hours that the adverse party reasonably must expend in order to prevail, and accordingly will bring about an increase in the amount of fees awarded. Contumacious behavior by a defendant does not call automatically for a premium over and above the number of additional hours that such behavior has made reasonably necessary. Furthermore, had the defendants' conduct been truly obstructionist, the plaintiff had an available remedy under G.L. c. 231, § 6F, which it could have pursued in the Superior Court but did not. The plaintiff justifies its position also by assigning weight to the fact that it has not sought compensation for an additional 452.5 hours, valued at $150,626.50, that it voluntarily removed from its application. The simple answer to that is that the forgoing of an opportunity to make an excessive fee request even more excessive is hardly a defense to an overreaching application. Finally, the plaintiff points to the eight-year life of the case from its inception to the trial on the merits. As we have indicated, the length of the case is reflected in the number of hours reasonably devoted by counsel, and does not require the addition of a premium.

Addressing the subject of an appropriate hourly rate, the record shows that the plaintiff's lead counsel, responsible for 2,272 of the 4,082.8 hours for which fees are sought, charged between $250 and $400 per hour at various stages of the proceeding. Affidavits of attorneys knowledgeable with respect to the local culture regarding fees charged in civil rights cases supported these rates, the judge implicitly accepted them, and that finding is warranted. By contrast, the plaintiff offered nothing regarding the levels of skill or

experience of the remaining attorneys responsible for 1,810.8 of the hours set forth in the application. We know nothing of their years in practice, the kind of practice in which they have been engaged, their experience in this kind of litigation, or anything else that might guide us in determining appropriate hourly rates for their services. If inexperienced with regard to the subject matter, they were not entitled to educate themselves at the expense of the client (or, as in this case, the adversary). See *Matter of Fordham*, 423 Mass. 481, 490 (1996), cert. denied, 519 U.S. 1149 (1997). The judge dealt with the problem by deriving an over-all average hourly rate of $280 and applying it across the board to everything, including both ***481** the work of lead counsel and the work of all other attorneys. While this has the virtue of a rough-and-ready simplicity that fortuitously may do justice, we prefer an approach, at least in a case of this nature where lead counsel is such a significant figure in the process, that separates the rate awarded to lead counsel from the rate or rates awarded to others.[13]

We consider the problem of applying these considerations to the actual fee application. There is some precedent for making the determinations ourselves based on our familiarity with the record and our awareness of prevailing standards in the relevant legal community. This practice is often followed in the Federal courts. See *Lipsett v. Blanco*, 975 F.2d 934, 943-944 (1st Cir.1992); *Gay Officers Action League v. Puerto Rico*, 247 F.3d at 299. However, we believe it to be the better practice in normal circumstances to remand so that the matter can be reconsidered by the trial judge. That judge, having presided at the trial

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[13] In arriving at his fee award, the trial judge folded the plaintiff's expenses (apart from expert witness fees) into the total. We believe that the plaintiff is entitled to separate reimbursement for expenses reasonably incurred. Its application sets forth a total of out-of-pocket expenses apart from those associated with expert witnesses of $67,037.77. On remand, the trial judge should determine which of these expenses should be reimbursed.

and related proceedings, is in a superior position to undertake the evaluation of legal services rendered and to make the specific findings. The judge shall be free to act on the present record or to seek amplification of it as he sees fit.

5. *Expert witness fees.* We are left with the question of how to treat the expert witness fees for which the plaintiff seeks reimbursement of an additional $48,921.56. The judge recognized that expert witness fees in cases under 42 U.S.C. § 1983 are not allowable costs under 42 U.S.C. § 1988 beyond the level set forth in 28 U.S.C. § 1821(b). See *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444-445 (1987). Such fees may be reimbursed under the Massachusetts Civil Rights Act (Act), and the judge did so (allowing $47,027). See G.L. c. 12, § 11I. The defendants contend that this award was impermissible because the plaintiff did not make claims under the Act, the case was not tried on that theory, and the judge erred in any event in determining that the defendants had violated the Act. We pass the first two grounds because we ***482** conclude that the evidence did not warrant a finding in the plaintiff's favor under the Act, and thus expert witness fees could not be awarded.

To recover under the Act, the plaintiff had to prove "that (1)[its] exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by 'threats, intimidation or coercion.' " *Swanset Dev. Corp. v. Taunton*, 423 Mass. 390, 395 (1996), citing G.L. c. 12, § 11I. Economic pressure employed to "coerce individuals to forgo the exercise of their secured rights" constitutes coercion for purposes of the statute. See *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 647 (2003). Whether a municipality is susceptible to suit under the Act has not been decided definitively. We have held that a municipality is not a

"person" for purposes of the Act. See *Howcroft v. Peabody*, 51 Mass.App.Ct. 573, 591-592 (2001). Earlier cases in the Supreme Judicial Court and in this court, while concluding on the records presented that there was insufficient proof of threats, intimidation, or coercion to justify findings for the plaintiffs, implied that, were the evidence otherwise, liability might lie against the municipality or municipal agency. See *Freeman v. Planning Bd. of W. Boylston*, 419 Mass. 548, 564-566, cert. denied, 516 U.S. 931 (1995); *Murphy v. Duxbury*, 40 Mass.App.Ct. 513, 518-519 (1996). In *Swanset Dev. Corp. v. Taunton*, *supra* at 396, the Supreme Judicial Court left the question open.

We need not attempt to resolve the issue for present purposes. Even assuming that there can be liability on the part of the defendants under the Act, such a finding could not be made on this record. There was no evidence that the defendants indulged in "threats" or "intimidation" with respect to the plaintiff or its proposed activities. Thus, the question is whether there was evidence of "coercion," and we conclude that there was not.

The matter appears to be controlled by *Pheasant Ridge Assocs. Ltd. Partnership v. Burlington*, 399 Mass. 771, 781 (1987), where, in connection with an unlawful taking of the plaintiff's property, the court ruled that the Act did not apply. ***483** "[T]he taking did not itself interfere or attempt to interfere with the plaintiffs' rights by coercion. The taking was an attempted direct, preemptive act and did not seek to coerce any plaintiff to do or not to do anything. Legislation, even unlawful legislation, lacks any quality of coercion when that legislation seeks to eliminate the rights of a person and does not seek to force that person unwillingly to do or not to do something otherwise lawful." *Ibid.* See *Longval v. Commissioner of Correction*, 404 Mass. 325, 333 (1989) ("A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion and

thus does not implicate the Act"). Here, the record lacks sufficient evidence of an "animus against the plaintiff[ ] or [its] project . . . unrelated to [the defendants'] legitimate concerns." See *Murphy v. Duxbury, supra* at 518. There being no liability in this case pursuant to the Act, it follows that there can be no award of expert witness fees thereunder.

We add a final observation on the subject of awards of attorney's fees and costs. The economics of the practice of law are complex. The increasing levels of revenues required to sustain the operations of lawyers and law firms, some unavoidable, some perhaps self-inflicted, directly influence hourly rates and the services performed. If attorneys are able to command those revenues by means of arm's-length contractual arrangements entered into with their own clients, so be it. They cannot, however, expect routinely to receive them in fee awards entered against opposing parties. The case of *Lewis v. National Shawmut Bank*, 303 Mass. 187, 191 (1939), is old, but its words are timely:

> "The power of a court . . . to require payments out of the property of litigants to or for the benefit of counsel who may not have been employed by those whose estates are thus diminished and who may have opposed the latter's interests is a power of great delicacy to be exercised with extreme caution. It is difficult to conceive of anything more likely to undermine public respect for the administration of justice than a wide spread suspicion that the courts are aligned in aiding the distribution among counsel of excessive proportions of the funds of those who are unfortunate enough to become involved in controversy."

***484** As the prevailing party on the substantive issues involved in this appeal, the plaintiff also is

entitled to an award of reasonable appellate attorney's fees and costs. In accordance with the procedure in *Fabre v. Walton*, 441 Mass. at 10-11, the plaintiff may file an application therefor within fourteen days of the rescript of this opinion. The defendants will have fourteen days to respond to the application.

6. *Conclusion.* The judgment that permanently enjoins enforcement of the ordinances at issue against the plaintiff is affirmed. We vacate the order on the plaintiff's petition for attorney's fees and costs and remand for further proceedings consistent with this opinion.

So ordered.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE
John Adams Courthouse
One Pemberton Square, Suite 1200
BOSTON, MASSACHUSETTS 02108-1705
(617) 725-8106

September 8, 2006

Ira H. Zaleznik, Esquire
Lawson & Weitzen
88 Black Falcon Ave., Suite 345
Boston, MA 02210

RE: No. 2005-P-0109

T & D VIDEO, INC.
vs.
CITY OF REVERE & another

NOTICE OF DOCKET ENTRY

Please take note that on September 8, 2006, the following entry was made on the docket of the above-referenced case:

ORDER: ".... plaintiff ... has petitioned for rehearing on a single aspect of ... fee-award section ... We are not persuaded ... it is ...business ... of ... Appeals Court ...to pass upon fee requests pertaining to proceedings in the Supreme Judicial Court. Petition for rehearing denied. (L KN CW, JJ.) Notice/Image (copy given in hand to Neal Quenzer)

Very truly yours,

The Clerk's Office

Dated: September 8, 2006

To: Allen C. B. Horsley, Esquire
Mark A. Walsh, Esquire
Ira H. Zaleznik, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

05-P-109

T&D VIDEO, INC.[14]

vs.

CITY OF REVERE & others.[15]

ORDER

The plaintiff, T&D Video, Inc., has petitioned for rehearing on a single aspect of the fee-award section of the decision, see T&D Video, Inc v. Revere, 66 Mass. App. Ct. 461, 478 (2006), wherein we reversed that portion of an attorney's fee award that related to the defendants appeal of the preliminary injunction in the Supreme Judicial Court. The essence of the plaintiff's position appears to be that, because only an interlocutory appeal was involved, the plaintiff had not yet achieved the status of a "prevailing party" for fee application purposes.

We disagree. We believe that the plaintiff prevailed in that case before the Supreme Judicial Court, and its status as the prevailing party in that appeal became fixed when the court returned its decision regardless of what might happen in subsequent proceedings regarding a permanent injunction. Of greater importance is our view that the question is not one of timing, but rather of location. We are not persuaded that it is the business either of

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[14] Doing business as Moonlite Reader.

[15] Zoning board of appeals of Revere and the building inspector of Revere.

the Appeals Court or of a trial court to pass upon fee requests pertaining to proceedings in the Supreme Judicial Court.

Petition for rehearing denied.

By the Court (Laurence, Kantrowitz & Cowin, JJ.),

/s/ Lena M. Wong
Asst. Clerk

Entered: September 8, 2006

APPENDIX E

Supreme Judicial Court for the
Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston,
Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Ira H. Zaleznik, Esquire
Lawson & Weitzen
88 Black Falcon Ave., Suite 345
Boston, MA 02210

RE: Docket No. FAR-15584

T & D VIDEO, INC.
vs.
CITY OF REVERE & others

Suffolk Superior Court No. SUCV1994-06216
A.C. No. 2005-P-0109

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 09/28/06, the above-captioned Application for Further Appellate Review was denied. (Cowin, J., recused)

Susan Mellen, Clerk

Dated: September 28, 2006

To: Allen C. B. Horsley, Esquire
Ira H. Zaleznik, Esquire

APPENDIX F

Supreme Judicial Court for the
Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston,
Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Dated: December 15, 2006

Ira H. Zaleznik, Esquire
Lawson & Weitzen
88 Black Falcon Ave., Suite 345
Boston, MA 02210

RE: No. FAR-15750

T&D VIDEO, INC.
vs.
CITY OF REVERE & others

Suffolk Superior Court No. SUCV1994-06216
A.C. No. 2005-P-0109

NOTICE OF LIMITED ALLOWANCE OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on December 15, 2006, the above-captioned Application for Further Appellate Review was allowed, limited to the issues in the plaintiff's application regarding its request for appellate attorney's fees related to the appeal of the preliminary injunction (T & D Video, Inc. v. Revere, 423 Mass. 577 (1996)). (Cowin, J., recused)

Upon receipt of the case papers from the Appeals Court, notice will be sent to counsel

indicating the new S.J.C. docket number, the number of briefs/appendices transferred, and the Sitting to which the case is assigned for argument before the full bench.

Susan Mellen, Clerk

To: Allen C. B. Horsley, Esquire
Mark A. Walsh, Esquire
Ira H. Zaleznik, Esquire

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

In the case No. FAR-15750

T&D VIDEO, INC.

vs.

CITY OF REVERE & others

O R D E R

It is hereby ORDERED that the above-captioned application for further appellate review be, and hereby is ALLOWED, limited to the issues in the plaintiff's application regarding its request for appellate attorney's fees related to the appeal of the preliminary injunction (T & D Video, Inc. v. Revere, 423 Mass. 577 (1996)). Notice to counsel.

By the Court (Cowin, Jr. recused),

/s/ Susan Mellen
Susan Mellen, Clerk

ENTERED: December 15, 2006